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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-690

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Petitioner,

vs.

WESTERN ALFALFA CORPORATION,

Respondent.

On a Writ of Certiorari to the Supreme Court of Colorado

Brief of 34 Named States as Amici Curiae in Support of Petitioner

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Interest of Amici Curiae

The Colorado Court of Appeals has held that an unannounced and warrantless inspection and test of visible air pollution, made on the premises of an industrial polluter, violates fundamental elements of due process of law and constitutes an unreasonable search. The State of California and the states named in this brief are greatly concerned that the decision of the Colorado Court of Appeals, if affirmed by this Court, will result in significant restrictions on the ability of state and local air pollution control agencies to enforce visible emission standards. The Colorado decision may also have the effect of subjecting other state in-

spection, monitoring and testing procedures to unwarranted constitutional attack by industrial polluters, not only in the field of air pollution but in other areas of environmental pollution as well.

Amici curiae are initially interested in this litigation because, if upheld, the Colorado decision will seriously undermine the effectiveness of the Ringelmann technique for measuring visible emissions. Virtually every state has adopted visible emission standards which are expressly related to the Ringelmann chart and equivalent opacity, and the states strongly rely on these standards in enforcing their air pollution laws.[1]

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[1]California's statewide visible emission standard is typical:

> *"Discharge of air contaminant; prohibitions.* A person shall not discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than three minutes in any one hour which is:
>
> (a) as dark or darker in shade as that designated as No. 2 on the Ringelmann chart, as published by the United States Bureau of Mines; or
>
> (b) of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (a) of this section." (California Health and Safety Code § 24242.

During fiscal year 1972-1973, the Los Angeles County Air Pollution Control District issued 428 citations to industrial polluters for violations of the District's visible emission standards. Records, Los Angeles Air Pollution Control District (1972-1973).

For examples of other state visible emission standards see:

Alabama Air Pollution Control Rules and Regulations, Ch. 4, Part 1 (1972); Arizona Rules and Regulations for Air Pollution Control, Art. 7, Part 1, Reg. 7-1-3.1 (1972); Arkansas Air Pollution Control Code, Sec. 4 (1969); Connecticut Admin. Reg., Sec. 19-508-18 (1972); Georgia Air Quality Control Rules, Ch. 270-5-24.02 (1972); Idaho Air Pollution Control Regulations, Part E (1972); Illinois Pollution Control Bd. Rules and Regulations, Ch. 2, Part II, Rule 202 (1972); Iowa Rules and Regulations Relating to Air Pollution Control, Sec. 4.3(2)(d)(1972); Kansas Air Pollution Emission Control Regulations, 28-19-50 (1972); Kentucky Particulate Emission Regulations, Sec. 1 (1972); Loui-

The Ringelmann technique for testing and monitoring visible emissions is a valuable enforcement tool for a number of reasons: (1) observers can be rapidly trained; (2) no expensive equipment is required; (3) one observer can make numerous observations per day; (4) measurements, if properly made, are reasonably accurate; (5) the nature of visible emissions often indicates whether plant machinery and pollution control equipment are being properly maintained and operated; and (6) control can be achieved over air pollution sources not readily suitable to regular source testing methods, such as control over teepee burners for lumber mill waste, dust and other leakage from process equipment, visible vehicular and aircraft exhaust, and bulk loading of dusty materials.[2]

It is important, in achieving accuracy with the Ringelmann technique, that the light source be at the rear of the observer during daylight hours. In addition,

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siana Air Pollution Control Regulations, Sec. 18.0 (1972); Title 38, Me. Rev. Stat. Ann. Sec. 598 (1972); Maryland Air Quality Regulations, Sec. 10.03.36.02 (1972); Michigan Admin. Code, 1967, as Amended by 1972 Addendum to Admin. Rules, Annual Supp. R 336.41; Nebraska Air Pollution Control Rules and Regulations, Rule 20 (1972); Nevada Air Quality Regulations, Art. 4 (1972); New Hampshire Particulate Matter Regulations, S III (1972); New Jersey Air Pollution Control Code, Ch. 7, Sec. 1 (1972); New Mexico Air Quality Standards and Regulations, Sec. 401 (1970); New York Rules, Title 6, Ch. III, Air Resources, Sub. Ch. A, Part 211 (1972); North Carolina Rules and Regulations Governing the Control of Air Pollution, Regulation 2 (1972); Oklahoma Regulation 7 (1971); Oregon Admin. Rules, Ch. 340, Sec. 21-015 (1970); Rhode Island Air Pollution Control Regulations, Regulation 1 (1967); South Carolina Air Pollution Control Regulations and Standards, Standard No. 1A (1972); South Dakota Air Pollution Control Regulations, Part 3 (1972); Tenn. Air Pollution Control Regulations, Ch. V (1972); Texas Air Control Regulations, Rule 103 (1972); West Va. Admin. Regs., Ch. 16-20, Series VII, Sec. 2 (1970).

[2]*See* State of California Air Resources Board, *Visible Emissions Evaluation Course Manual,* Section V, p. 6 (Jan. 1974).

readings should be made at right angles to wind direction, at least two stack heights but not more than one-quarter of a mile from the base of the stack.[3] In many instances, light and wind conditions do not require entry onto industrial premises to make a Ringelmann reading. Yet there are enough instances where entry onto an open area of the premises is necessary for proper positioning of the observer that a constitutional requirement for a search warrant would seriously limit the usefulness of the Ringelmann technique.

Many states permit inspectors to enter industrial premises without a warrant if the entry is made at reasonable times for the purpose of administering air pollution regulations.[4] The state interest in permitting entry without a warrant is complemented by a strong federal interest in allowing authorized representatives of the Environmental Protection Agency to enter "any premises in which an emission source is located." Federal Clean Air Act Amendments of 1970, 42 U.S.C. § 1857c-9(a)(2)(A). The Clean Air Amendments of 1970 do not require a warrant prior to such entry. Furthermore, if states do not have adequate legal authority to enter the premises of a polluter for purposes of inspection and monitoring, the Administrator of the Environmental Protection Agency may delegate his entry authority if he approves of the state's entry,

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[3]State of California Air Resources Board, *Visible Emissions Evaluation Course Manual*, Section VI, p. 2 (Jan. 1974).

[4]*See*, for example, California Health and Safety Code § 24246; Miss. Code § 7106-122(a) as amended (1972); Montana Stats. Ch. 313, § 9 (1967); Nebraska Rev. Stats. § 81-1504 (21) (1971 Supp.); Nevada Rev. Stats. § 445.476; Georgia Code § 88-907; Kansas Stat. Ann. 65-3009; 35 Pa. Stats. 4013.1 as amended (1972); New Jersey S.A. 26: 2C-9(d); Gen. Laws Rhode Island § 23-25-5(g) (1968); New Hamp. Rev. Stat. Ann. 125:81 VII (Supp.).

inspection and monitoring procedures. 42 U.S.C. § 1857c-9(b)(1). Thus state and federal air pollution control laws strongly rely upon the ability of air pollution inspectors, during reasonable hours, to enter the premises of a polluter for enforcement purposes.

Of even greater concern to the states participating in this brief is the ruling by the Colorado Court of Appeals that the very act of recording visible emissions without the awareness of the polluter violates fundamental due process of law. If the polluter must be made aware each time visible emissions are being recorded by a field inspector, control over visible emissions will suffer. Typically, state visible emission standards permit excessive emissions for a period of three minutes or less per hour. Field inspectors therefore must have the flexibility to make recordings when excessive emissions first become apparent. Notification of polluters that visible emission measurements are imminent also provides polluters with the opportunity to reduce their emissions—to remain in compliance during the measuring process. Unannounced inspections by duly constituted law enforcement officials clearly serve as a strong deterrent to air pollution violations. A constitutional requirement that a polluter must be notified prior to the measurement of the pollutant will frustrate the enforcement of air quality as well as other environmental quality standards.[5]

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[5]This is true also of noise emissions and certain kinds of water pollution which may last for only a brief period of time. Pollution control inspectors must be able to act rapidly before the emission dissipates in order to identify sources and maintain compliance with emission regulations.

Summary of Argument

Colorado health officials ordered respondent to cease and desist from violating the state's visible smoke emission standards in connection with its plant operations. Respondent denied that it violated the law, and at an administrative hearing, presented evidence to support its contention, and cross-examined persons presenting evidence against it. The fact that the state gathered evidence of the violation without respondent's knowledge is not significant since due process did not require that the state accord respondent an opportunity to be present when evidence was gathered.

The Fourth Amendment did not require the inspector to obtain a warrant to enter outdoor portions of respondent's premises since those portions of the premises were publicly accessible and the respondent exhibited no expectation of privacy and the circumstances did not indicate that it would be reasonable to maintain an expectation of privacy. Moreover, the circumstances show that no warrant was required because the emissions were in plain view, the inspector had probable cause and acted on exigent circumstances, and because he entered the premises pursuant to a valid regulatory statute.

ARGUMENT

INTRODUCTION

On June 16, 1969, after nearly two years of negotiation, the Colorado Department of Health, Division of Administration (Division), advised Western Alfalfa Corporation (Western), that the smoke plumes emitting from three of its northern Colorado alfalfa dehydrating plants violated the opacity standards of the Colorado Air Pollution Control Act[6] (Act), and ordered the corporation to cease and desist from "any further violations" of the Act.[7] The Cease and Desist Order was based on observations made on June 4, 1969, by a field inspector for the Colorado Department of Health who, pursuant to the Act (C.R.S. 66-29-8(2)(d)), had entered the premises of the three plants for the purpose of reading the opacity of emissions coming from company stacks.

On January 31, 1970, after a full evidentiary hearing, the Air Pollution Variance Board of the State of Colorado (Board) found that Western's June 4 emissions did violate the Act's applicable air emission standards and affirmed the action of the Department of Health. The Weld County, Colorado, District Court, on November 18, 1971, set aside the Board's decision upon its finding that both the Division and the Board had denied due process of law to Western in that the

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[6]Colorado Revised Statutes, 1963, § 66-29-1, *et seq.* (1967 Perm. Cum. Supp.).

[7]The Cease and Desist Order, (A. 1), is the Department's Exhibit E to the transcript of the hearing before the Air Pollution Variance Board of the State of Colorado and forms part of the record before this Court.

All citations herein to appendices refer to the parties' joint appendix to the briefs on the merits (A.).

Division representative made his inspection without notifying Western and thereby precluded Western from effectively rebutting the evidence against it. On April 3, 1973, the Colorado Court of Appeals affirmed the District Court's decision, concluding that the inspector's act of making the observations on the premises without either a warrant or the consent of anyone from Western constituted an unreasonable search, the consequence of which was to preclude the company from effectively exercising its right of confrontation before the Variance Board. The court held that in order to protect the company's right of confrontation, "it is constitutionally mandatory in this type of case that the party accused be aware of the taking of tests and measurements on its premises at the time they are made."

STATEMENT OF FACTS

The Colorado Air Pollution Control Act, *supra*, footnote 6, is a comprehensive statute whose purpose is "to maintain a reasonable degree of [air] purity . . . consistent with the public health, welfare, and public enjoyment . . ." and "to require the use of all available practical methods to reduce, prevent, and control air pollution in the State of Colorado. . . ."[8] C.R.S. 66-29-2. As the Act read in June, 1969, it prohibited the discharge of visible smoke emissions in excess of

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[8]The Colorado Air Pollution Control Act of 1970 was challenged for use of similar language and was upheld against an attack which alleged lack of adequate legislative standards. *Lloyd A. Fry Roofing Co. v. State Department of Health Air Pollution Variance Board*, ... Colo. ...., 499 P.2d 1176, 1179-1180 (1972).

40% equivalent opacity, or a Number 2 Ringelmann, for more than three minutes out of any hour.[9]

The Act charges the State Department of Health, Division of Administration, with the duty to investigate suspected sources of air pollution (C.R.S. 66-29-8(e)(2)(d)), to negotiate compliance with the Act, and as a last resort to issue cease and desist orders to violators. C.R.S. 66-29-10(3).

Beginning in the fall of 1967, almost two years prior to issuing its June 16, 1969 Cease and Desist Order, the Division commenced monitoring the visible smokestack emissions at Western's Windsor, Eaton, and Berthoud plants.[10] Based on its initial readings the Division notified Western that it was violating the Act's visible emission standards and began consulting with Western to develop a program to control its smokestack emissions. As a result of these consultations, Western took some steps to comply with the Act. Western's efforts were inadequate, however, and on June

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[9]Colorado Revised Statutes 66-29-5 provided in pertinent part that no person shall discharge into the atmosphere any air contaminant . . .

"(b) as dark or darker in shade as that designated as No. 2 on the Ringelmann chart; or

"(c) of opacity equal to or greater than smoke described in paragraph (b) of this subsection . . ."

Another provision of the Act not invoked by the Health Department at any time in these proceedings regulated the volume of particulate matter by weight which could be discharged into the air. C.R.S. 66-29-5(3) (1967 Perm. Cum. Supp.).

[10]James R. Taylor, a Division inspector, made opacity readings at the Windsor plant on September 11, 1967; at the Eaton plant on October 19, 1967; and at the Berthoud plant on October 30, 1967. (A. 24-25.)

4, 1969, James R. Taylor, a Division inspector, observed visible emission violations at the Windsor, Eaton, and Berthoud plants. At that time he made and recorded the following opacity readings:

1. *Windsor Plant*

Dryer stack	90% opacity
Grinder stack	70% opacity
Pelletizer stack	50% opacity

2. *Eaton Plant*

Dryer stack	85% opacity
Grinder stack	70% opacity
Pelletizer stack	50% opacity

3. *Berthoud Plant*

Dryer stack	90% opacity
Grinder stack	50% opacity
Pelletizer stack	40% opacity

(A. 24-25.) Taylor made the opacity readings by obtaining an unobstructed view of each smoke plume and visually observing its opacity rate in relation to the Ringelmann standard.[11] He conducted this test to de-

[11]The Ringelmann chart referred to by the statute is published by the United States Bureau of Mines in Information Circular No. 8333, dated May, 1967, and is the accepted device for measuring the degree to which smoke obscures the background. The Ringelmann chart itself is used only for measuring black or gray smoke. Smoke of other colors is measured in terms of its opacity equivalency to the shades on the Ringelmann scale. A No. 2 Ringelmann is equivalent to 40% opacity. A certified smoke reader is trained to determine the percentage of

termine the extent to which the smoke impeded a clear view of the background.[12]

Taylor was trained in and certified by a State-sponsored Smoke School to observe and rate the opacity of smoke plumes. (A. 21.) He was certified as a smoke reader after a determination that he could consistently observe smoke plume opacity without deviating more than 5% from the observation of an electronic eye. (A. 47, 121.) In making his readings he was taught to take into account the wind direction, the position of the sun relative to his location, and the condition of the sky and the background behind the smoke. (A. 121.)

Taylor made his June 4 readings from vantage points on the premises of each plant (A. 25) by observing each plume for at least ten continuous minutes (A. 26); taking care to make readings at the point at which all the steam had dissipated from the plumes. (A. 35.) No one accompanied Taylor as he made and recorded the opacity readings. (A. 25.)[13]

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opacity without the necessity of having a Ringelmann chart before him.

Equivalent opacity, both as a statutory standard and as a means for determining compliance with the standard, has been described and upheld in numerous cases. *See State v. Lloyd A. Fry Roofing Company*, 9 Ore. App. 189, 495 P.2d 751 (1972), remanded on other grounds, ... Ore. ...., 502 P.2d 253 (1972), opinion reinstated in full, ... Ore. App. ...., 502 P.2d 1162 (1972); *City of Portland v. Lloyd A. Fry Roofing Company*, 3 Ore. App. 352, 472 P.2d 826, 827 (1970); *People v. International Steel Corp.*, 102 Cal. App. 2d Supp. 935, 938-939, 226 P.2d 587, 590-591 (1951).

[12]It is significant that there is some connection, but no direct correlation, between the opacity of the visibile emission and the load of particulate matter being carried in the smoke plume. (A. 44, 126-127, 132.) Accordingly, a particular emission source may be in compliance with the particulate matter regulation yet exceed minimally acceptable opacity standards and foul the sky.

[13]On October 16, 1969, subsequent to the conclusion of the testimonial portion of the hearing, counsel for Western argued

(This footnote is continued on next page)

On the basis of the June 4, 1969 readings, the Department of Health issued its Cease and Desist Order of June 16, 1969, *supra,* footnote 7. Within ten days of receiving the Cease and Desist Order, Western filed a written request for a hearing before the Air Pollution Variance Board of the State of Colorado, requesting the Board to consider the question of whether it had violated the provisions of the Air Pollution Control Act. By requesting a hearing, Western stayed the effect of the Cease and Desist Order. C.R.S. 66-29-10 (4).

The Board convened on September 11, 1969 to hear evidence on the issue of whether Western had violated the visible emission standards of the Act. The Department of Health and Western appeared through counsel. James Taylor, the Division-trained observer, testified for the State and was cross-examined by counsel for Western. Taylor testified as to the procedure he used in making the June 4, 1969 Ringelmann readings and as to the content of those readings. In addition he offered photographic evidence of his June 4 readings. (A. 34.)[14] Western representatives testified that its October 9 and 10, 1968 plant operations were essentially the same as its June 4, 1969 plant operations. It then presented evidence that it complied with the visible emission standards of the Act on October 9 and 10, 1968 to support the proposition that it complied on June 4, 1969. (A. 56.) It also attempted to

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before the Variance Board that it could not rebut the June 4 evidence gathered by Taylor because the company did not know it was being inspected on June 4. (A. 75.)

[14]Department Exhibits F, G, and H, which form part of the record before this Court, are photographs which show the smoke plumes rising from the Windsor and Eaton plants on June 4, 1969.

introduce evidence that in July of 1969, one month after the recorded violations, it conformed to the statutory provision which regulated the volume by weight of particulate matter which could be carried in a smoke plume.[15] (A. 68.)

Having considered the evidence and the arguments of counsel, on January 31, 1970, the Board concluded that Western's emissions were of an opacity greater than permitted by law and that Western was operating in violation of the Air Pollution Control Act of 1966.

Western appealed the Board's decision to the Colorado District Court for Weld County. On November 18, 1971, after a limited evidentiary hearing, that court held that Western had been denied due process of law in that it was precluded from presenting effective rebuttal evidence because the health inspector made his opacity readings without notifying the company and because only public employees could be certified as official smoke readers upon graduation from the State training school.[16]

On April 3, 1973, the Colorado Court of Appeals affirmed the decision of the Weld County District

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[15]A revision to the Air Pollution Control Act which became effective July 1, 1969, allowed a company to avoid a finding of visible emission violation if it could show compliance with the particulate emission standards. C.R.S. § 66-29-5(2)(e) (1969 Perm. Cum. Supp.). The new provision (deleted from the Act in 1970) very narrowly circumscribed the conditions under which a violation of the visible emission standard could be avoided. The exemption from liability would apply only if the test method chosen by the company was acceptable to the Division and if the Division determined that there was a reasonable correlation between opacity and the load of particulate emissions for the source in question. In its Findings of Fact the Variance Board found that the Division had not made the required determinations and therefore refused to consider the proffered evidence. *See* A. 69. *See also,* footnote 12, *supra.*

[16]See footnote 19, *infra.*

Court. It held that the Ringelmann test standard as used in the instant case is constitutional but that the Division's method of collecting evidence violated Western's constitutional right to be secure against unreasonable searches and seizures and its constitutional right to due process of law. The court reasoned that because of the evanescent nature of the evidence, the accused could have a reasonable opportunity to confront the evidence against it only if it were aware "of the taking of tests and measurements on its premises at the time they are made."

The Supreme Court of the State of Colorado denied Writ of Certiorari on June 25, 1973, and on January 21, 1974, this Court issued a Writ of Certiorari to the Colorado Supreme Court to review this case, *Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation,* Case No. 71-494.

I

THE ADMINISTRATIVE HEARING CONFORMED TO THE REQUIREMENTS OF DUE PROCESS

A. Respondent Was Provided Its Right to Present Evidence and Confront Persons Presenting Evidence Against It

In this case, the Air Pollution Variance Board conducted a trial type hearing to resolve the question of whether respondent violated the visible emission standards of the Colorado Air Pollution Control Act. Both petitioner and respondent were represented by counsel and accorded ample opportunity to present testimonial and documentary evidence in support of their respective positions. James R. Taylor, the Division's trained observer, testified for the Department of Health

that he took the September and October, 1967 readings at the Windsor, Eaton, and Berthoud plants (*supra,* foonote 10; that he thereafter periodically visited and took readings at these plants (A. 23); that he from time to time conferred with Western's management in an effort to secure Western's compliance with the Act (A. 23); and that he took the June 4, 1969 readings upon which the Cease and Desist Order was based.

Counsel for respondent cross-examined Taylor at length (A. 28-37) about the procedures Taylor followed in makng his June 4 readings and about the content of those readings. Counsel elicited from Taylor the fact that the witness had taken photographs[17] of the Windsor and Eaton plant emissions at the time he made his Ringelmann readings. (A. 31.) Counsel for respondent introduced these photographs into evidence. (A. 31.)

Accordingly it is clear that the Board provided respondent ample opportunity to exercise its *at trial* right of confrontation. *Nelson v. O'Neil,* 402 U.S. 622, 29 L.Ed. 2d 222 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970); and *Greene v. McElroy,* 360 U.S. 474 (1959). In *Greene* at page 496 the Court articulated the scope of the accused's right to confrontation in an administrative hearing, specifying that:

(1) The evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue; and

(2) When the perceptions and prejudices of an individual may be involved that person must be subject to confrontation and cross-examination.

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[17]See footnote 14, *supra.*

This is a procedural due process right designed to protect persons from substantial deprivation resulting from a decision based on *ex parte* evidence. *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 103-105 (1963). See also *California v. Green,* 399 U.S. 149, 157-158 (1970).

B. Due Process of Law Does Not Impose an Affirmative Duty on the Division to Notify Respondent of Its Intention to Make Ringelmann Readings

Due process is an elusive concept whose requirements vary with the factual context. The nature of the right involved, the nature of the proceeding, and the possible burden on the proceeding are among the considerations which must be taken into account in determining if a right obtains in a specific proceeding. *Jenkins v. McKeithen,* 395 U.S. 411, 426 (1969).

In the instant case respondent presents a novel due process argument. Respondent was not accorded an opportunity to be present when evidence of its law infraction was gathered. It argues that as a consequence of this fact it could not effectively rebut the evidence of its infraction when that evidence was presented in a trial type hearing. Ordinarily such an argument would have no merit since the right to confrontation and cross-examination pertains at the hearing of a matter and not at the time that evidence is being developed. *Nelson v. O'Neil, supra.* Respondent suggests, however, that because of the evanescent nature of the evidence in this case (the degree of opacity of a smoke plume), it must be present at the time the evidence is developed to effectively rebut it at the hearing of the matter. Neither considerations of policy nor case precedents support respondent's analysis.

Policy considerations require, under the circumstances of this case, that the Division make frequent unannounced inspections if it is to effectively enforce the visible emission standards of the Act and credibly deter would-be violators.[18] This is true for three reasons. First, if the Division were to notify a subject of its intent to make an inspection, it would accord that subject an opportunity to change conditions to skew the inspection results. The subject could do this instantly in several ways: (1) shut down the operation; (2) reduce production; (3) turn on an emission control device (a scrubber or bag house); (4) increase the energy available to an emission control device; (5) throw water on the dust to reduce particulate emissions; (6) alter the content of the material being processed. Second, the Division's ability to make "surprise" inspections is crucial to encouraging industries to effectively police themselves. In *See v. City of Seattle,* 387 U.S. 541, at 545 (1967), the Court expressly recognized that "surprise may often be a crucial aspect of routine inspections of business establishments." Third, the Division's effective enforcement of the Act requires that it have the flexibility to make random inspections, make inspections at a moment's notice, or otherwise inspect as the circumstances require. *United States v. Biswell, supra,* at 316.

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[18]In *United States v. Biswell,* 406 U.S. 311, 316 (1972), the Court based its decision to uphold warrantless searches pursuant to the Gun Control Act of 1968, 82 Stat. 1213, 18 U.S.C. section 921, *et seq.,* in part, upon the fact that the warrant process would impede the statute's effective enforcement and lessen the deterrent value of the statute. These policy considerations must also be considered in determining whether the State is obliged to give notice to the accused prior to making an inspection. In this connection, in *See v. City of Seattle,* 387 U.S. 541, 545 (1967) the Court recognized the legitimate law enforcement value of surprise inspections.

Western's interest in independently preserving evidence of its visible emissions at the time of the alleged infraction can be served without requiring the Division to forego the benefits of unannounced inspections; and in any event, is not sufficiently strong so as to require the Division to forego those benefits. Colorado Revised Statutes, 1963, section 66-29-5 (1967 Perm. Cum. Supp.) imposed on Western the responsibility to maintain its visible emissions within legally acceptable limits. To comply with this statute, Western could monitor its visible emissions.[10] Even better, it could install, operate and maintain devices which it knows with certitude would reduce emissions to a point where there was no danger or chance of exceeding the standards. The grinder and pelletizer stack emissions could have been controlled to ninety-nine percent efficiency with a suitable device (bag house). The dryer emissions could have been controlled properly through

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[10]It might do this in two ways: (1) At a reasonable cost, Western might install an electronic eye on each smoke stack which would continuously monitor visible emissions. This would not only assist Western to comply with the law but would also enable it to independently preserve evidence of the degree of opacity of visible emissions. (2) Western could employ its own Ringelmann expert to monitor visible stack emissions and this would substantially serve the purposes the electronic eye would serve.

The District Court for Weld County, on the basis of testimony that only State officials could be certified by the State-operated Smoke School, concluded that Western's confrontation rights had been denied, but the record plainly reveals that industrial people could, and often did, attend the Smoke School. (A. 48.) Western offered no evidence to show that it could not bring in a qualified smoke reader from another state or that a qualified but noncertified observer was prohibited from testifying before the Variance Board. Moreover, Western could have established its own smoke school, perhaps in conjunction with other industries, and could have certified its own graduates. In fact the Board admitted an engineering report offered by Western which contained company-obtained smoke readings. (A. 55-56.)

operational changes. (A. 42-43.) Had Western installed such devices and presented evidence that it operated them, such evidence would have strongly supported the proposition that Western complied with the Act on June 4, 1969. Accordingly, had Western taken conscientious steps to comply with C.R.S. 66-29-5, it would have been able to more effectively rebut the Division's allegations of noncompliance.

In any event, the relevant court decisions do not support respondent's position. *Capler v. City of Greenville, Mississippi*, 298 F. Supp. 295 (N.D. Miss. 1969); affirmed 422 F.2d 299 (5th Cir. 1970) is on point. In *Capler* the court concluded that due process did not require peace officers to *affirmatively* offer an incarcerated individual an opportunity to take scientific tests to preserve evidence of his transitory condition of intoxication. *Capler* is similar to the instant case in that both involve the issue of whether law enforcement officers must take affirmative steps to provide the accused with an opportunity to independently preserve evidence that is subject to dissipation. The two cases are dissimilar in that in *Capler* the accused was incarcerated during the time that the evidence dissipated and therefore had to depend on the law enforcement officers for an opportunity to scientifically preserve evidence whereas in the instant case Western had the opportunity, resources, and responsibility to control with certitude and to frequently or continuously monitor its visible emissions. If under the circumstances of *Capler* due process did not require law enforcement officers to affirmatively offer the accused an opportunity to scientifically preserve evidence, then *a fortiori* due process does not impose such a requirement in the instant case. *See also Brady v. Maryland*, 373 U.S. 83 (1963).

Finally, in analyzing what the right to confrontation demands of evidence gathering in this case, it is important to note that the primary function of the Cease and Desist Order and the gathering of evidence to support it was to compel Western to install proper control devices; not to convict a person of a crime.[20] The real issue involved was whether Western would spend the money necessary to control its pollutants. The Division should not be hampered in achieving its reasonable regulatory ends by being required to give Western notice of its intention to make specific inspections. It is sufficient that the statute places Western on notice that it is subject to periodic inspection for the purpose of determining whether it complies with the Air Pollution Control Act.

II

THE FOURTH AMENDMENT DID NOT REQUIRE THE INSPECTOR TO OBTAIN A SEARCH WARRANT

A. The Fourth Amendment Protections Do Not Extend to the Circumstances of This Case

The Fourth Amendment secures people against unreasonable searches and seizures. *Katz v. United States*, 389 U.S. 347 (1967). Whether a particular "search" or "seizure" is unreasonable depends on two factors. First, does the person exhibit "an actual (subjective) expectation of privacy?" Second, is that exhibited expectation "one that society is prepared to recognize as 'reasonable?' " *See Katz v. United States, supra* at 361 (Justice Harlan concurring). The facts of the in-

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[20]*See* C.R.S. § 66-29-15(4) (1967 Perm. Cum. Supp.); *Lloyd A. Fry Roofing Company v. State Department of Health Air Pollution Variance Board*, ... Colo. ...., 499 P.2d 1176, 1180 (1972). *See also, Jenkins v. McKeithen*, 395 U.S. 411, 428-429, comparing the facts of that case to those of *Hannah v. Larche*, 363 U.S. 420 (1960).

stant case unequivocally demonstrate that respondent exhibited no expectation of privacy, and that even if respondent had exhibited such an expectation, it would not be one which society would deem reasonable.

First, the stack emissions which the Division's inspector observed were clearly visible to persons in the area. The photographic evidence adduced at the Board's hearing of this matter reflects that fact. *See* Exhibits F, G and H to the transcript of proceeding before the Board. Moreover, the identifying information on the reverse side of these photographs appears to indicate that the inspector first observed a smoke plume while he was outside the respondent's premises. Exhibit G, the earliest photo (3:10 p.m.) was taken from the highway outside the Eaton plant premises. (A. 32.) That photograph shows a distant smoke plume. The next photograph (also of the Eaton plant) was taken five minutes later (3:15 p.m.), apparently from a parking lot area within the plant premises. These two photographs provide evidence that the Division's inspector first noticed a possible Ringelmann standard violation while he was driving on the public roadway some distance from respondent's operation. Based on that observation, the inspector entered the plant's parking lot area to get close enough to make a Ringelmann reading.[21] These Eaton plant photographs show that respondent knew that its stack emissions were visible to passers-by and that respondent apparently took no steps to prevent such passers-by from observing the stack emissions and driving onto the plant premises.

[21]The third photograph, Exhibit H, was taken twenty minutes later (3:35 p.m.) at the Windsor plant and demonstrates that the inspector visited Windsor after inspecting Eaton. The record does not show the time he visited the Berthoud plant.

Second, the record indicates that from September 1967 to June 1969 the Division inspectors periodically visited plant sites with plant management's knowledge. (A. 21.) There is no indication anywhere in the record that respondent ever objected that these periodic inspections constituted an unreasonable invasion. To the contrary, the record indicates that the Division inspectors and respondent's management maintained a productive dialogue. (A. 21-22.) Third, the photographic evidence, *supra,* tends to show that the inspector minimally intruded onto plant premises that were generally open to the public. Moreover, there is no indication in the record that respondent objected to or tried to prevent public access to its premises.

These considerations of visibility, public access, historical relation, and degree of intrusion all demonstrate that respondent neither exhibited nor had any actual expectation of privacy and was not entitled to Fourth Amendment protection. *See v. City of Seattle, supra,* at page 545. Moreover, they support the proposition that even if respondent could show that it had a subjective expectation of privacy (and that it had exhibited that expectation), it would not be one that society would deem reasonable. In addition the fact that air pollution presents a serious health problem; that the purpose of the Colorado statutory scheme is to "maintain a reasonable degree of purity of the air resources of the state" (C.R.S. 66-29-2); and that the statute cannot be effectively enforced unless the Division's inspectors have sufficient flexibility to respond to apparent infractions as they come to the Division's attention all support the proposition that society would not deem such an expectation of privacy as reasonable. See footnote 18, *supra,* and the discussion on pages 17-19.

B. Even if Fourth Amendment Protections Extend to the Circumstances of This Case, No Warrant Is Required

1. A Warrantless Search Was Justified Because the Inspector Had Probable Cause and the Circumstances Were Exigent

When a reasonable expectation of privacy is justified, a warrant is required except in narrowly defined circumstances. But a public official charged with enforcing the law is not required to turn his back on a law violation occurring in front of him. This is especially true when the violator is conducting an activity which endangers or interferes with others and the evidence of his violation is easily removable.

The key element is justification for the warrantless search, both as to its object and its extent. In *Carroll v. United States*, 267 U.S. 132, 162 (1924) this Court upheld a search when the officers had personal knowledge or trustworthy information which would justify a reasonable man in believing that a moving automobile contained contraband. The search did not depend on the right to arrest but rather on the reasonable belief that the automobile contained contraband, possession of which was prohibited by law. *Carroll*, 267 U.S. at 158-159.

An inspector who sets out on any given day to inspect certain plants or to move through the city or countryside at random does not know if he will encounter air pollution violations. A known source can vary in its emissions from day to day or hour to hour depending on a variety of factors in the control of the owner or operator. Often the inspector reacts to a citizen's phone call telling of a burst of smoke emissions. In all these circumstances the inspector must

have the capability to respond immediately to observe a violation and act in an appropriate manner to obtain the cessation of the discharge. In this case, just as in *Carroll,* the purpose of the "search" is to eliminate a prohibited substance. In this case—pollutants; in *Carroll*—contraband. Moreover, visible air emissions escape faster than a speeding car and cannot be located again in the same or another jurisdiction. Since the circumstances which furnish probable cause are unforeseeable and the opportunity to search is fleeting, the officer is justified in conducting a reasonably circumscribed search directed against the prohibited substance. *See Chambers v. Maroney,* 399 U.S. 42, 50-51 (1970).

The purpose of a warrant is to interpose the judgment of a disinterested judicial officer between the police and the citizenry when a citizen's reasonable expectations of privacy are threatened. *Spinelli v. United States,* 393 U.S. 410, 419 (1968). However, the facts may be of more general nature when an administrative search is involved, *Camara v. Municipal Court,* 387 U.S. 523 (1967), and in the case of a commercial enterprise the magistrate's sanction is required only when the officer intends to enter upon portions of the premises which are not open to the public. In *See v. City of Seattle, supra,* at 545, the Court held:

> "We therefore conclude that administrative entry, without consent, *upon the portions of commercial enterprises which are not open to the public* may only be compelled through prosecution or physical force within the framework of a warrant procedure." (Emphasis added.)

In the present case the inspector did not enter company buildings or offices, and there is no evidence in

the record of Western invoking any restriction against entry by the public into the open areas where the inspector had to stand to make his observations. Discovering at some distance that smoke was rising from the Western plants, the inspector was justified in finding a location on the plant premises where he could accurately and reliably assess whether unlawful air pollution was occurring.[22]

2. The Inspector Upon Discovering Smoke Emissions in Plain View Had a Right to Document the Degree of Their Offensiveness

The plain view doctrine has been the subject of concern and confusion to the courts, not alone public officers charged with enforcing the law. *See Coolidge v. New Hampshire,* 403 U.S. 443, 464-473 (1971). In one sense the plain view doctrine could be a device for analyzing whether the Fourth Amendment applied at all where exposure to public view destroyed a reasonable expectation of privacy. Or it might serve as an exception to the warrant requirement when an officer not knowing whether he would find a prohibited substance or evidence of a crime, but having a particular object of surveillance in mind, sets out on patrol and then

[22]The Colorado Court of Appeals relied on *Camara v. Municipal Court, supra. Camara* is inapposite, however, since in that case the issue was whether a municipal official could "enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein." *Camara,* at page 527. *See v. City of Seattle, supra,* the companion case to *Camara* and decided by the court on the same day, considers the issue of whether "*Camara* applies to similar inspections of commercial structures which are not used as private residences." *See* at page 542. *See* is distinguishable from the instant case in two respects. First, in this case the inspector made no attempt to enter a structure. Second, in this case the evanescent nature of the evidence requires that the inspector be able to act on a moment's notice.

discovers easily removable material in plain sight. *See Katz, supra,* 389 U.S. at 351 as compared with *Coolidge, supra,* 403 U.S. at 468-469. In the second circumstance the *Coolidge* Court stated that a warrant can be dispensed with when the officer has "an extraneous valid reason" for his presence, when there are "exigent" circumstances and when the discovery of evidence is "inadvertent." Stated in another fashion, the warrant *is* required when the object of surveillance is *not dangerous* in itself and the police *know* that they will find the object in plain view:

> ". . . to extend the scope of . . . [a warrantless] intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." *Coolidge, supra,* 403 U.S. at 471.

In the present case there are valid reasons for invoking the plain view doctrine due to the prohibited and dangerous nature of air pollution, the uncertainty of its presence in forbidden amounts at any given time, its propensity to rapidly disperse across the countryside, the inspector's right to conduct surveillance along the highways and byways, his duty to read a smoke plume when he sees one before him, and his statutory authorization to enter industrial premises if necessary to make a proper observation. *See* C.R.S. § 66-29-8(2)(d) (1967) Perm. Cum. Supp.).

Observations made from within private property which immediately surrounds a dwelling place or residence (*i.e.,* the "curtilage") generally constitute an

illegal search when an officer without a warrant does not have justification to enter the curtilage. *Fullbright v. United States,* 392 F.2d 432, 434 (10th Cir. 1968). However, the Fourth Amendment is not equivalent to a civil trespass statute. An officer conducting surveillance may in some circumstances enter upon a private open field and there make observations which may justify his entry of the curtilage to retrieve or more closely observe something which is in plain view and reasonably appears to be an illegal substance. *Id.* at 435. *See Hester v. United States,* 265 U.S. 57 (1924).

Thus, observations made on industrial premises at some distance from offices or other structures should not constitute an unconstitutional search when the only purpose of the inspector's entry is to reliably and accurately assess the opacity of a smoke plume which is visible from outside the property. Furthermore, an air pollution inspector should be permitted to enter upon the open fields of an industrial operation in order to see if the company is emitting smoke which, due to the geographical expanse of the premises or the position of the smoke plume, is not visible or adequately measurable from off the property.

3. The Entry in This Case Was Pursuant to Valid Authorization of State Regulatory Statute, Which Authorization Was Reasonably Designed for the Express Purpose of Controlling Noxious Air Pollutants

In *United States v. Biswell,* 406 U.S. 311, 315-317 (1972), the Court held that warrantless regulatory searches might proceed where the legality of the search depends not on consent but on the authority of a valid statute, where the effectiveness of the inspection system turns on necessary flexibility as to time,

scope and frequency of inspections, where the intrusion is minimal and can reasonably be observed by the owner or operator of a business, where the public interest is strong, and where the possibilities of abuse and the threat to privacy are not of impressive dimensions. Though *Biswell* was decided in the context of a federal regulatory scheme there exists little justification for restricting its application to the federal government. The Federal Clean Air Act, which has entry provisions almost identical to those of Colorado in the present case (42 U.S.C. § 1857c-9), recognizes that the control of air pollution, though a matter of intense federal concern, is primarily a responsibility of state government. 42 U.S.C. § 1857(a).

Industrial air pollution is a serious threat to the public health and welfare. Any entity or individual who undertakes to profit from public trade must expect reasonable control measures when its profit-making activities may affect the health of the community. This Court has long articulated this policy. Mr. Justice Jackson, authoring the Court's decision in *United States v. Morton Salt Company*, 338 U.S. 632 at 652 (1950) said that:

> "While they may and should have protection from unlawful demands made in the name of public investigation, . . . corporations can claim no equality with individuals in the enjoyment of a right to privacy. [Citation.] They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. [Citations.] Even if one were to

> regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."

Colorado chose to protect its citizens against the ill effects of air pollution by passing its Air Pollution Control Act. An important part of the legislation was the right of entry onto private premises for the purpose of conducting tests for harmful air containants.[23] The standards were stringent; and, due to the variable and constantly fluctuating nature of emissions into the atmosphere, unannounced and immediate testing, and entry for testing, were deemed to be the most effective investigative and control tools. By design or by chance, the smoke or other emissions may change while the inspector seeks and obtains a warrant.

The Colorado legislation was reasonably designed to achieve the purpose of obtaining clean air for the citizens of the State. Entry for testing would be made only during operating hours since emissions were the subject of concern. The Act insured that the inspector would enter only for purposes connected with controlling harmful contaminants which are vented into the surrounding air.

The foregoing considerations demonstrate that the principles which the Court enunciated in *Biswell* should extend to this case. The inspector should not be required to obtain a warrant to observe smokestack emissions from vantage points on the plant premises.

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[23]C.R.S. 66-29-8(d) (1967 Perm. Cum. Supp.).

Conclusion

The record before the Court shows that the Division's inspector acted in a reasonable manner when he entered respondent's premises to conduct Ringelmann tests and that respondent was accorded all its due process rights at the hearing before the Board. Moreover, the record shows that it would frustrate substantially the Division's ability to enforce the Act if the Division's inspector were required to either obtain a warrant or give notice to respondent before entering respondent's premises to conduct Ringelmann tests. Accordingly, the Court should reverse the judgment of the Colorado Court.

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